BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN C. FEHRENBACHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,187
ALDERSGATE VILLAGE	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP, INC.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the August 6, 2007 Award of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent and claimant failed to provide respondent with timely notice of an accident.

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael L. Entz of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on November 13, 2007.

ISSUES

1. Did claimant prove that he suffered accidental injuries arising out of and in the course of his employment? Respondent contends claimant's allegations of an accident are fabricated and claimant should be denied any award as a result. Respondent further contends claimant's problems are the result of an injury suffered at home on or about October 16, 2005. Claimant contends his version

of the alleged accident at work is supported by the record and requests the Award be reversed and benefits granted.

2. Did claimant provide timely notice of accident? Claimant alleges he was helped up from the floor by a charge nurse and then he filled out appropriate paperwork with a different charge nurse. Respondent contends claimant's testimony is contradicted by the absence of any paperwork indicating claimant suffered a work-related injury, and by the testimony of respondent's representatives.

3. What is the nature and extent of claimant's injuries and disability? Claimant argues that he is entitled to a 21 percent permanent partial whole person disability under K.S.A. 44-510e. Respondent requests the ALJ's denial of benefits be affirmed.

4. Did the ALJ err in assessing the costs of the transcripts to claimant? The ALJ determined that claimant's story was not credible, calling it "concocted". The ALJ then assessed the entirety of the costs in this proceeding to claimant.

FINDINGS OF FACT

Claimant began working, full time, for respondent as a CNA on May 12, 2005. On October 16 or 17, 2005, he suffered a fall down a flight of stairs at his girlfriend's house, injuring his left knee and his left wrist. Claimant was initially examined by Leon Herring, the physician's assistant to orthopedic surgeon Craig L. Vosburgh, M.D., of Tallgrass Orthopedic & Sports Medicine. Claimant was released to limited duty and instructed to wear a knee brace. Claimant contacted Mr. Herring on November 1, 2005, and requested that he be returned to regular duty. This request was granted, but claimant was instructed to continue wearing the brace. However, the record indicates that, at some point, claimant was placed back on light duty by respondent. Mr. Herring also referred claimant for an MRI, which was performed on November 4, 2005. The MRI indicated claimant had a probable torn medial meniscus, but no anterior cruciate ligament (ACL) tear. This finding was contrary to Mr. Herring's impression during the clinical examination, which Mr. Herring thought indicated a torn ACL. Claimant returned to Mr. Herring on November 10 and was referred for physical therapy. Claimant continued wearing the knee brace at work.

Claimant alleges that sometime between the middle and the end of November, he slipped on some water in a resident's bathroom at respondent's facility and fell down. At that time, claimant felt a pop in his left knee and experienced a considerable amount of pain. Claimant initially alleged a date of accident on November 20, 2005. Claimant also, however, testified the accident occurred on a weekend. This weekend accident date is

why he was not initially able to give notice to his supervisor, Rebecca Barkley, as she did not work on weekends. However, respondent's records indicated that claimant did not work the weekend of November 20. In claimant's brief to the Board, it is alleged the date of accident is November 16, 2005. However, this date does not fall on a weekend. Claimant also advised Lynn A. Curtis, M.D., a board certified physical medicine and rehabilitation specialist, that he was injured on November 8, 2005. However, this date is also not on a weekend. Claimant acknowledged at the regular hearing that he was not sure of the exact date of the alleged accident.

Claimant testified that after the fall, he was unable to get up off the floor. He was eventually aided by two co-workers, Jenny and Heather. He described Jenny as a charge nurse in his unit. Claimant testified that he filled out paperwork after the accident when he reported it to another charge nurse, Christine Owen. This paperwork was never located and neither Jenny nor Heather nor Christine Owen testified in this matter.

Respondent did provide the testimony of Rebecca (Becky) Barkley, claimant's unit manager. Ms. Barkley was aware of claimant's knee injury suffered at his girlfriend's house. Claimant was put on light duty at some point after that incident, but the exact date of that light duty is not contained in this record. Claimant remained on light duty until he left work to have knee surgery on March 17, 2006. Ms. Barkley testified that claimant never mentioned a work-related injury to his knee. She also never saw any incident report regarding a work-related injury involving claimant.

Harriet Fontana, respondent's director of human resources, first became aware that claimant was alleging a work-related knee injury when respondent received letters from claimant's attorney. These letters arrived sometime after May 22, 2006. Ms. Fontana noted that claimant's personnel file contained no papers relating to a work injury suffered by claimant.

Claimant first went to Tallgrass Orthopedics & Sports Medicine (Tallgrass) on October 20, 2005. On that date, he was examined by physician's assistant Leon Herring regarding the injury suffered on October 17, 2005, at his girlfriend's house. Claimant returned to Tallgrass and was seen by Mr. Herring on November 3. Mr. Herring had the impression that claimant had a possible anterior cruciate ligament (ACL) tear. Mr. Herring recommended an MRI, which was done on November 4, 2005. James K. Fisher, M.D., the physician who read the MRI, indicated a probable medial meniscus tear, but not an ACL tear. Claimant was seen by Mr. Herring again on November 10, with the diagnosis remaining the same. Dr. Vosburgh interpreted Mr. Herring's impression from the November 10 report to include a possible ACL injury regardless of the lack of confirmation on the MRI. Physical therapy was recommended.

Claimant was first examined by Dr. Vosburgh on December 15, 2005. At that time, the history given to the doctor included the injury at his girlfriend's house. There was no mention in the report from that examination of a work-related injury. Dr. Vosburgh

diagnosed a medial meniscus tear and reiterated the possibility of an ACL disruption. Surgery to repair the knee was initially scheduled for January 2006. However, claimant called and cancelled that surgery. Claimant was next examined by Dr. Vosburgh on February 13, 2006. Claimant complained that the knee had been giving way, the knee was quite sore and claimant felt that "something is out of place".[1] Claimant inquired as to whether they had a stronger brace. The surgery was rescheduled for March 17, 2006. The history remained limited to the injury in October 2005 at his girlfriend's house. Again, there was no mention of a work-related injury in November 2005. Dr. Vosburgh testified that he uses the physician's assistant's notes during his evaluation, but that he also routinely asks the patient exactly what happened. He would have noted a difference between the history provided to his physician's assistant and that provided to him. Dr. Vosburgh did not remember claimant ever telling him of any other trauma to his knee.

Claimant underwent surgery on March 17, 2006, for a partial medial meniscectomy for a bucket handle tear of the medial meniscus and ACL reconstruction.

Claimant was examined at the request of his attorney by board certified physical medicine and rehabilitation specialist Lynn A. Curtis, M.D., on August 22, 2006. Dr. Curtis was provided a history which included an injury at respondent's facility on November 8, 2005. This date does not fall on a weekend and does not coordinate with any other alleged date of accident in this record. Dr. Curtis diagnosed claimant as being post surgery to the left knee, rating claimant at 19 percent to the left lower extremity for the knee, which included 2 percent for peripheral nerve loss. Dr. Curtis also rated claimant for a moderate fibular-calcaneal ligament injury to the left ankle, for which he assessed claimant 10 percent to the left lower extremity. Dr. Curtis also diagnosed claimant with stress-related eczema to the head and face which he attributed to the accident with respondent, for which he rated claimant at 15 percent to the whole body. All of Dr. Curtis' ratings were pursuant to the fourth edition of the AMA *Guides*.[2] Dr. Curtis acknowledged there was no information in the records to indicate a November 8, 2005 injury. That was just the date given to him by claimant.

Claimant was examined by board certified orthopedic surgeon David J. Clymer, M.D., at the request of a nurse case manager on June 18, 2007. Claimant disclosed an injury at home in October 2005, with no specific date indicated, and discussed a work-related injury alleged in November 2005, again with no specific date given. Dr. Clymer acknowledged the medical records failed to indicate a new, work-related injury to claimant's knee after October 2005. Dr. Clymer acknowledged the dispute between the radiologist's reading of the MRI indicating no ACL tear and Mr. Herring's impression of an ACL tear. He testified that MRIs are accurate about 85 percent of the time. He also noted

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[1] Vosburgh Depo., Ex. 1 at 10.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

that it is not uncommon for him to question the impressions of a radiologist if his clinical impression is different. Dr. Clymer determined that claimant's left knee injury was caused by the fall at home in October 2005. He based his opinion on the lack of mention of a work-related injury in the medical records, the significant injury at home and the clinical findings suggestive of an ACL tear after the home injury. He rated the knee in the range of 6 to 10 percent of that extremity.

The ALJ, in the Award, determined that claimant was not entitled to an award in this matter. He determined the evidence indicated that claimant had "concocted a story about a work accident after he was terminated from his employment." The ALJ went on to assess the costs of this litigation to claimant.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

[3] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2005 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[7]

The ALJ found claimant's testimony of an injury occurring in November 2005 to lack credibility. Not only was claimant not able to identify a specific date of accident, the various documents in this record indicate several possible dates of alleged accident. Medical records contemporaneous with the alleged work-related injury fail to mention a work accident. The accident report, which claimant states was prepared at the time of the injury, was never found. And the testimony of respondent's employees failed to corroborate a work-related accident. The employees who claimant alleges could verify the accident were not deposed. The Board finds the determination by the ALJ that claimant has failed to prove he suffered an accidental injury arising out of and in the course of his employment should be affirmed.

The ALJ went on to assess the costs of this litigation to claimant. K.S.A. 2005 Supp. 44-552(b) allows the cost of preparing a transcript to be taxed as costs "at the discretion of the director." Traditionally, the costs in workers compensation litigation are assessed against the respondent.[8] However, the regulation states that the costs may be assessed against a party other than the respondent. Here, the determination by the ALJ that claimant had "concocted a story" apparently convinced him that the costs should be taxed to claimant, as a sort of penalty. While it is possibly proper to tax costs to a claimant when a particularly egregious claim arises, that does not appear to be the case here. This claimant identified three of respondent's employees who could have supported his allegations of a work-related fall. For reasons not known, neither party deposed those witnesses who could have provided that added proof of accident and injury. So, while claimant's claim fails, the Board does not find it appropriate to assess the costs of this litigation to claimant under these circumstances. The assessment of costs to claimant by the ALJ is, therefore, reversed and the costs will be paid by respondent.

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[8] K.A.R. 51-2-4.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed with regard to the assessment of costs in this matter, but affirmed in all other regards. Claimant has failed to prove that he suffered a work-related accident. Therefore, the denial of benefits by the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 6, 2007, should be, and is hereby, reversed with regard to the assessment of costs against the claimant, but affirmed in all other regards.

IT IS SO ORDERED.

Dated this ____ day of December, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge